(3)

IN THE HON'BLE HIGH COURT OF JUDICATURE AT BILASPUR

CRIMINAL APPEAL NO. 55 /2001

APPELLANT : Murli Manohar s/o Bodhram aged 35 years, r/o village-Awraikala, P.S. Janjgir, district-Janjgir Chapa.

vs.

RESPONDENT : State of Chhattisgarh through P.S. Janjgir, district-Janjgir Champa.

Criminal Appeal Under Section 374(2) Cr.P.C.

A.F.R. (30)

8/7/04

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR

CRIMINAL APPEAL NO.1887 OF 2000

And

CRIMINAL APPEAL NO.55 OF 2001

JUDGMENT FOR CONSIDERATION

Sd/-
L.C. BHADOO
Judge

HON'BLE THE CHIEF JUSTICE

Sd/-
Chief Justice

Post for pronouncement of Judgment: 8th. September 2004

Sd/-
L.C. BHADOO
Judge

(31)

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR
(Division Bench)

CORAM : **HON'BLE SHRI A.S.VENKATACHALA MOORTHY, CJ**
& HON'BLE SHRI L.C. BHADOO, J

CRIMINAL APPEAL NO.1887 OF 2000

Banshilal

Versus

State of Chhattisgarh

And

CRIMINAL APPEAL NO.55 OF 2001

Murlimanohar

Versus

State of Chhattisgarh

Present: Smt. Savita Tiwari Advocate for appellant Banshilal.
Shri Dhirendra Mishra Advocate for appellant Murlimanohar.
Shri Ravindra Agrawal, Panel Lawyer, for the State/respondent.

JUDGMENT
(Delivered on 9th of ~~August~~ Sept. 2004)

The following Judgment of the Court was delivered by ***L.C. Bhadoo, J:***

Since Criminal appeal No.1887 of 2000 filed by accused/appellant Banshilal and Criminal Appeal No.55 of 2001 filed by Murlimanohar are arising out of the same judgment and relate to the same incident, therefore, these appeals are being disposed of by this common judgment.

(2) Both the accused persons are real brothers of the deceased. The accused/appellants have preferred these appeals being aggrieved by the judgment of conviction and sentence dated 30/05/2000, passed by the learned Additional Sessions Judge, Janjgir in Sessions Trial No.456 of 1998 by which the learned Additional Sessions Judge after holding the accused/appellant Banshilal guilty of the offences under Sections 302 & 323 of the Indian Penal Code and Murlimanohar for the offence under Section 302 read with Section 34 of the Penal Code sentenced each of them to undergo

imprisonment for life and to pay a fine of Rs.1,000/- in default of payment of fine to further undergo rigorous imprisonment for two months and to undergo rigorous imprisonment for six months and to pay a fine of Rs.500/- in default of payment of fine to further undergo rigorous imprisonment for one month and imprisonment for life and to pay a fine of Rs.1,000/- in default of payment of fine to further undergo rigorous imprisonment for two months, respectively.

(3) Factual scenario giving rise to these appeals is as follows: On 02/07/1998 at about 8.30 P.M. Hiralal (since deceased) was fencing his kitchen-garden; at that time accused/appellant Murlimanohar came there and objected Hiralal not to fence the kitchen-garden. On this, some altercation took place between them, as per the first information report (Ex.P/15), hearing the altercation between the two brothers, the third brother namely accused/appellant Banshilal came there carrying axe in his hand and attacked Hiralal with the axe on the left side of his head, as a result of which blood started oozing out of the injury caused on the head thereafter Banshilal also assaulted Hiralal from the wooden portion of the axe on the left leg, back and right shoulder. After sustaining the injuries Hiralal fell down. The occurrence was witnessed by Sadhmati (PW-1) wife of Hiralal, Hiramati (PW-8) mother of Hiralal and Mehtreen wife of one Johan Gond. The matter was reported to the Police by injured Hiralal himself at about 9.00 P.M.. The Officer In charge of Janjgir Police Station registered the first information report (Ex.P/15) for the commission of the offence punishable under Section 307 of the Indian Penal Code. The Investigating Officer immediately sent Hiralal for medical examination where Dr. S.N. Jangade, Medical Officer, District Hospital, Janjgir examined injured Hiralal and prepared report (Ex.P/8). He also examined Sadhmati and prepared report Ex.P/9. In the opinion of the doctor the injury was serious in nature. Therefore, he referred injured Hiralal to the District Hospital, Bilaspur where Hiralal succumbed to the injuries on 11/07/1998 after nine days of the occurrence. Dr. G.P./ Naidu (PW-13) sent a Merg intimation (Ex.P/12) to the Police Station, upon which the offence was converted into one under Section 302 of the Penal Code. Dr. K.K. Shukla (PW-15) conducted the post mortem on the dead body of Hiralal and prepared report Ex.P/15 in which mentioned that cause of death was head injury. The Investigating Officer prepared the Panchanama (Ex.P/3) of the dead body of the deceased. Axe – weapon of offence was taken into possession by the Investigating Officer at the instance of accused/appellant Banshilal. The Investigating Officer also took into possession the plain soil

and the blood stained soil from the place of occurrence. He also took into possession the clothes of the deceased and the accused/appellant Banshilal.

(4) After completion of the investigation the charge-sheet was filed against the accused /appellants before the Chief Judicial Magistrate, Janjgir who in turn committed the case to the learned Sessions Judge, Bilaspur fromwhere the learned Additional Sessions Judge, Janjgir received the case on transfer.

(5) The learned Additional Sessions Judge charged the accused/appellant Banshilal for commission of the offences punishable under Sections 302 and 323 of the Indian Penal Code and accused/appellant Murlimanohar for commission of the offence punishable under Section 302 read with Section 34 of the penal Code. The accused/appellants denied the charges and claimed to be tried.

(6) The prosecution in order to prove the charges against the accused/appellants examined in all 22 witnesses at the trial. On the other hand, the statements of the accused/appellants were recorded under Section 313 of the Code of Criminal procedure in which they denied the prosecution evidence. Accused/appellant Banshilal further stated that there was some land dispute between the deceased and the accused persons and Hiramati (PW-8) who was residing with the deceased used to quarrel with him. Objection was raised by Murli that the deceased should not fence the kitchen garden. On this, the deceased pressed the neck of Murlimanohar and when Murlimanohar raised scream for saving him he immediately reached the spot and separated them and in that process Hiralal received the injuries by the axe which Hiralal was having in his hand. Similar type of explanation was given by accused/appellant Murlimanohar. The Additional Sessions Judge discarding the explanation of the accused/appellants convicted and sentenced each of them in the manner mentioned above.

(7) We have heard Mrs. Savita Tiwari and Mr. Dhirendra Mishra learned counsel appearing for the accused/appellants and Mr. Ravindra Agrawal, Panel Lawyer, appearing for the State/respondent.

(8) As far as the nature of the death of deceased Hiralal being homicidal is concerned, it is not in dispute. Even otherwise PW-10 Dr. S.N. Jangade has stated in his evidence that on 02/07/1998 when he was working

as Medical Officer, Primary Health Centre, Janjgir he examined the injuries of Hiralal. There was one lacerated wound on the left parietal region in the size of 4 cm x 1 cm up to bone deep and blood was oozing out of the head injury as the injury was serious in nature, therefore, he referred the injured to District Hospital, Bilaspur. His report is Ex.P/8. PW-13 Dr. G.P. Naidu has stated that Hiralal died in the Hospital on 11/07/1998 and PW-15 Dr. K.K. Shukla has stated that on 12/07/1998 he was working as Medical Officer in the District Hospital Bilaspur. On that day he conducted the autopsy on the body of Hiralal and he found that there was a fracture on the left side of the head on the occipital region. Clotted blood was present beneath the fracture. Blood was present in the right chamber whereas left chamber was empty. In the opinion of the doctor the deceased died due to head injury. The post mortem report is Ex.P/15. Sadhmati (PW-1), wife of deceased Hiralal, has categorically stated that accused Banshilal assaulted her husband with an axe and blood started oozing out of the injury. Similar is the evidence of Hiramati (PW-8), mother of the accused persons and the deceased. In view of the above evidence, it is proved that the death of Hiralal was homicidal.

(9) Learned counsel appearing for accused/appellant Banshilal without disputing factual aspect of the case advanced the arguments that Hiralal received the injury on 02/07/1998 whereas he died in the hospital on 11/07/1998. There was only one assault by the accused/appellant and that too being brother of the deceased there was no intention of the accused/appellant to commit the murder of his real brother, rather everything happened at spur of moment. Therefore, the offence under Section 302 of the Indian Penal Code was not made out against the accused/appellant. At the most the offence would fall under Section 304, Part-II, IPC.

(10) As far as the finding of the learned trial Court to the extent that accused Banshilal was the author of the fatal injury as he attacked the deceased with an axe on the left parietal region, as a result of which Hiralal sustained grievous injury and he died after nine days of the occurrence in the hospital was proved by ocular and medical evidence. Sadhmati (PW-1), wife of the deceased, was the eyewitness to the incident and she has categorically stated that accused Banshilal assaulted her husband with axe. The defence counsel in the cross examination of this witness was not able to elicit anything which makes the evidence of this witness unreliable or un-trust worthy. The evidence of this witness stands corroborated by Hiramati (PW-8), mother of the deceased and the accused persons. Apart from that PW-2 Ramkrishna,

PW-3 Panchram and PW-4 Shantidas are the witnesses who immediately reached the spot and they saw the deceased in an injured condition and blood was oozing out of the injury. They have stated that on enquiry, deceased Hiralal disclosed to them that accused Banshilal had attacked him with the axe. Therefore, the finding of the learned trial Court to the extent that the accused/appellant Banshilal was the person who attacked the deceased with the axe on his head and as a result of which after nine days of the occurrence Hiralal died, is correct as the same is based on reliable trust worthy ocular evidence corroborated by medical evidence.

(11) Now coming to the question as to whether the offence under Section 302 of the Penal Code was made out against the accused/appellant. After perusing the evidence available on record, we are of the considered view that the arguments advanced by the learned counsel appearing for the accused/appellant has force for the reason that as per the first information report and the evidence of the wife and mother of the deceased that the deceased was fencing kitchen garden to which co-accused Murlimanohar objected and said as to why he was fencing in his kitchen garden and in that process some altercation took place between them, Murli raised cries at that point of time the accused/appellant came on the scene with axe, he attacked the deceased on his head from the blunt side of the axe, as per the injury report there was only one injury on the head and no other injuries were found on the body of the deceased. Therefore, in view of the above facts of the case and the evidence available on record, we are of the considered opinion that this act of the accused squarely covered within the purview of Exception 4 of Section 300 of the Indian Penal Code which lays down that "Culpable homicide is not murder if it is committed without premeditation in a sudden fight, in the heat of a passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner". The deceased was real brother of the accused and at the time of incident the other co-accused Murlimanohar objected to the deceased not to fence his kitchen garden on account of which there was some altercation between the two, on hearing the cries of Murli all of a sudden the accused/appellant came with the axe and assaulted the deceased from the blunt portion of the axe only once without any premeditation. Moreover, the deceased died after nine days of the occurrence. As per the evidence on record, there was some dispute about the land between three brothers. Accused Bansilal on hearing the cries of his brother Murli came on the scene

with axe and assaulted Hiralal without any premeditation in a heat of passion without taking any undue advantage or without acting in a cruel manner on a sudden provocation. These factor are suggestive of the fact that accused Banshilal on hearing the cries of Murli without realizing the consequences and unmindful of what he was doing was right or wrong attacked Hiralal in a spur of moment and heat of passion. Therefore, the offence under Section 304 Part-I was made out against the accused/appellant Banshilal.

(12) As far as the conviction and sentence imposed on accused Banshilal for the commission of the offence punishable under Section 323 of the Indian Penal Code, learned counsel appearing for the accused/appellant has not challenged the same.

(13) So far as the involvement of the accused/appellant Murlimanohar in the crime is concerned, Shri Dhirendra Mishra, learned counsel appearing for accused/appellant Murlimanohar argued that as per the FIR lodged by deceased Hiralal himself and the evidence of Sadhmati (PW 1) no overt act has been attributed to the accused/appellant as at the time of the occurrence the deceased was fencing the kitchen garden, at the relevant time the accused/appellant Murlimanohar came and objected deceased not to fence his portion of the land, in that process scuffle took place between them. The other brother namely accused Banshilal came there having an axe in his hand and assaulted Hiralal. Accused Murlimanohar was not even having any kind of weapon with him and he had no common intention with accused Banshilal to commit the murder of his real brother Hiralal- the deceased. Therefore, the prosecution has not been able to establish the offence punishable under Section 302 read with section 34 of the Indian Penal Code against accused/appellant Murlimanohar. Learned counsel vehemently argued that accused/appellant Murlimanohar has wrongly been held guilty for the said offence.

(14) In order to appreciate the arguments advanced by the learned counsel appearing for the accused/appellant Murlimanohar we have perused the record of the Sessions case. A bare perusal of the FIR (Ex.P/15) shows that the deceased himself lodged the same at Janjgir Police Station in which he has categorically mentioned that he was fencing the kitchen garden; at that time accused/appellant Murlimanohar came and started questioning as to why he was fencing the kitchen garden. On this, he replied that he was fencing his own kitchen garden and on this some altercation took place

between them. At that time at about 6.30 P.M. accused Banshilal came with an axe and attacked Hiralal on his head and thereafter accused/appellant Banshilal also assaulted Hiralal from the wooden portion of the axe. PW 1 Sadhmati, has stated that some altercation took place between her husband and accused Murlimanohar. On this, accused Murlimanohar raised alarm on which accused Banshilal came with an axe. Murlimanohar told Banshilal that what he is seeing "Maro" and on this accused Banshilal attacked her husband Hiralal with the axe on his head, as a result of which blood started oozing out of the injury. Taking note of the above evidence, we find that there is force in the arguments advanced by the learned counsel for the accused/appellant Murlimanohar for the reason that in the FIR lodged by the deceased himself nothing is mentioned that the accused/appellant Murlimanohar had common intention with accused/appellant Banshilal to attack the deceased to commit murder of Hiralal or accused/appellant Murlimanohar even instigated accused Banshilal to assault the deceased with the axe to commit murder of Hiralal. There is also no iota of evidence that accused Murlimanohar was having any knowledge that accused Banshilal was carrying axe with him. Even if we take the note of the evidence of Sadhmati, wife of deceased Hiralal, as it is, on the face of it, she has stated that accused Murlimanohar asked accused Banshilal what he is seeing "Maro" and on this accused Banshilal attacked the deceased with the axe. Even from the above evidence it can not be inferred that accused Murlimanohar asked accused Banshilal to kill their brother Hiralal. In view of the above evidence and taking note of using the word "Maro" the accused/appellant Murlimanohar instigated accused Banshilal to assault Hiralal, he could nevertheless be guilty for abatement of the offence punishable under Section 324 in view of Section 110 of the Indian Penal Code which reads as under;

> "110. *Punishment of abetment if person abetted does act with a different intention from that of abettor.*- Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other."

For this view we are supported by the judgment of the hon'ble Apex Court in the matter of **Matadin and another Vs State of Maharashtra** reported in **(1998) 7 Supreme Court Cases 216** in which almost similar facts were there and accused Matadin exhorted his fellows by saying "maro sale

ko" and on the facts the Court held that these words could not be used that the accused uttered these words with the intention to kill Ashok. Similar view was taken by the hon'ble Apex Court in the matter of **Ajay Sharma Vs State of Rajasthan** reported in **1999 SCC Vol. I 174.** In that case also the word "Maro" was interpreted as to assault and the Court held that this word can not be interpreted that the accused uttered this word to kill the deceased. Of course, Hiramati PW 8, mother of the accused/appellants and the deceased; has stated that when Hiralal fell down on the ground accused Murlimanohar also caught hold of him from the neck. But this was the improvement by Hiramati in her court evidence when she was confronted with her police statement (Ex.D/2), then she stated that why these words are not written in the police statement she does not know. As such on account of improvement in her evidence before the Court and looking to the FIR and the evidence of Sadhmati no value can be attached to evidence of Hiramati (PW-8). Therefore, in view of the above discussion, we are of the considered view that there was no premeditation or preplan between the accused/appellants to kill their own brother Hiralal and from the facts it cannot be inferred that there was common intention between the accused/appellants to commit the murder of Hiralal. However, as mentioned above it is proved that the accused/appellant Murlimanohar instigated Banshilal to assault the deceased and at that time Banshilal was carrying axe. Therefore, as per Section 110 of the IPC the accused/appellant Murlimanohar was guilty for committing the offence under Section 324/110 of the Indian Penal Code.

(15) In the result, both the appeals namely Criminal Appeal No. 1887 of 2000 and Criminal Appeal No. 55 of 2001 are partly allowed to the extent indicated below:

(A) The conviction of the accused/appellant Banshilal for the commission of the offence punishable under Section 302 is set aside and he is acquitted of that charge. However, the appellant is convicted for an offence under Section 304, Part I, IPC and for that he is sentenced to undergo R.I. for ten years and to a fine of Rs. 1,000/- and in default of payment of fine to further undergo R.I. for a period of two months. His conviction and sentence under Section 323 IPC are maintained. Both the sentences are directed to run concurrently.

(B) The conviction and sentence of accused/appellant Murlimanohar under Section 302/34 of the IPC are, therefore, set aside; instead,

he is convicted under Section 324 read with section 110 of the IPC and sentenced to the period already undergone as he has already undergone sentence more than sixteen months.

Sd/-
Chief Justice

Sd/-
L.C. BHADOO
Judge

Brajesh*